

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
FairPoint Communications, Inc.)	WC Docket No. 10-90
Petition for Limited Waiver of)	
Section 54.312(c))	
of the Commission's Rules,)	
47 C.F.R. §54.312(c))	
Notice Requirements of the Connect America)	
Fund, Phase I, Round 2)	

**PETITION FOR LIMITED WAIVER
TO IDENTIFY, *NUNC PRO TUNC*, THE CENSUS BLOCKS AND LOCATIONS
IN VIRGINIA IN WHICH FAIRPOINT DEPLOYED BROADBAND TO MEET
THE REQUIREMENTS
OF CAF PHASE I, ROUND 2**

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March 30, 2017

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On behalf of its local exchange company subsidiary in the Commonwealth of Virginia, Peoples Mutual Telephone Company, FairPoint Communications, Inc. (“FairPoint”) hereby requests that the Commission grant a limited waiver of Section 54.312(c) of its rules¹ to permit FairPoint to submit, *nunc pro tunc*, the locations and census blocks in which FairPoint deployed broadband in satisfaction of the requirements for receipt of Connect America Fund (“CAF”), Phase I, Round 2 support. Good cause exists to grant this waiver. FairPoint and its customers will be severely burdened by strict enforcement of this rule, whereas grant of the requested waiver will not unduly prejudice any party or burden the CAF high-cost support mechanism in any way.

¹ 47 C.F.R. §54.312(c)

I. BACKGROUND

Pursuant to the *USF-ICC Transformation Order* and subsequent actions in this docket, the Commission established the CAF Phase I incremental support mechanism to stimulate immediate investment in broadband in unserved areas, pending the finalization of rules for the CAF Phase II program.² Support was distributed in two tranches, the first in 2012, and the second in 2013. This petition concerns Round 2 support, in which the Commission offered price cap carriers³ incremental support in two different amounts for broadband deployment to unserved locations.⁴ First, carriers accepting this support committed to deploy broadband to the number of unserved locations, equal to the amount accepted divided by \$775.⁵ Second, if the carrier committed to deploy to all eligible locations that could economically be served with \$775 in support plus \$775 in non-CAF capital expenditure by the carrier, and additional funding was made available to that carrier by the Commission, the carrier could accept additional support if it committed to deploy broadband to additional, “underserved” locations, in a minimum

² *Connect America Fund, Universal Service-Intercarrier Compensation Transformation Order*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶133, 145 (2011); *Connect America Fund, Phase I Report & Order*, 28 FCC Rcd 7766, 7771 (2013).

³ Although Peoples Mutual Telephone Company is a rate-of-return company under the FCC’s pricing regulations, it is treated as a price cap company for CAF purposes. *See Connect America Fund, Universal Service-Intercarrier Compensation Transformation Order*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶128 (2011).

⁴ A location was deemed “unserved” if it was shown on the then-current version of the National Broadband Map (“NBM”) as unserved by fixed Internet access with speeds of at least 768 kbps downstream and 200 kbps upstream. 47 C.F.R. §54.312(c)(2).

⁵ Other requirements applied, for example, that the carrier electing incremental CAF Phase I support certify that the locations were, in fact, unserved. *See* 47 C.F.R. §54.312(c)(5).

number equal to the remaining incremental support accepted divided by \$550.⁶ Build-out originally was required to be completed within three years of the date on which the carrier notified the FCC of its acceptance of CAF Phase I, Round 2 funding.⁷ Upon conclusion of the challenge process, the Wireline Competition Bureau extended this deadline to January 10, 2017 for FairPoint.⁸ FairPoint completed buildout to the required number of locations by January 10, 2017.

In order to ensure that targeted locations were unserved at the time the carrier elected CAF Phase I, Round 2 support, the carrier was required to notify the FCC, USAC and the affected state (and any affected tribal authority) of the amount of support the carrier wished to accept, and the wire centers and census blocks in which broadband would be deployed using that support. This notice was required to be made within 75 days of FCC notice of the offer of support, and the FCC conducted a “challenge process” permitting others to assert that a listed census block⁹ actually was shown as served on the NBM.¹⁰ If an electing carrier subsequently chose to deploy to census blocks not initially identified at the time of election, it was required to inform the FCC, USAC and the affected state (and any affected tribal authority) at least 90 days prior to commencing deployment in the newly identified census blocks – again, providing an

⁶ 47 C.F.R. §54.312(c)(3).

⁷ *Id.*, §54.312(c)(9).

⁸ *Wireline Competition Bureau Announces Deadline for Connect America Phase I, Round 2*, Public Notice, WC Docket No. 10-90, DA 14-1392 (Wireline Competition Bur., rel. Sept. 25, 2014).

⁹ The challenge process was based on Census Blocks being served but the FCC clarified in paragraph 11 of FCC 12-47 that locations in partially served Census Blocks can be included.

¹⁰ *Id.*, §54.312(c)(7).

opportunity for a “challenge process.”¹¹ It is those notice requirements that are the subject of this petition.

In Virginia, where FairPoint had not accepted any CAF Phase I, Round 1 support, FairPoint accepted (post-challenge) \$626,550 in CAF Phase I, Round 2 support for 42 locations that were unserved at 768/200 kbps (the “Unserved Locations”), and 1,080 locations that were unserved at 3 Mbps/768 kbps (the “Underserved Locations”) for a total of 1,122 locations in 14 census blocks. Subsequently, FairPoint also submitted the list of these post-challenge served and underserved locations to which it intended to build to the FCC, USAC and the Commonwealth of Virginia on February 24, 2015¹². In its annual reports filed with USAC on June 23, 2015 (submitting Round 2 Year 1 information) and June 21, 2016 (submitting Round 2 Year 2 information), FairPoint submitted information concerning deployment. Pursuant to FCC rules, these filings were also submitted to the FCC and the Commonwealth of Virginia.

On September 30, 2016, 102 days before the qualifying deployment period terminated on January 10, 2017, USAC wrote FairPoint indicating it was auditing FairPoint’s use of CAF Phase I, Round 2, Year 2 support, and questioning whether the locations FairPoint had identified in the FCC Form 481 Report properly qualified for CAF Phase I, Round 2 support, as some or most of the latitude/longitude pairs submitted appeared to be in census blocks not identified by FairPoint in the Section 54.312(c)(7) challenge process, within 75 days following notice of the offer of support. It appeared that only 95 of the locations which FairPoint deployed broadband using CAF

¹¹ *Id.*, §54.312(c)(4).

¹² This filing was required in *Wireline Competition Bureau Announces Deadline for Connect America Phase I, Round 2*, Public Notice, WC Docket No. 10-90, DA 14-1392 (Wireline Competition Bur., rel. Sept. 25, 2014).

Phase I, Round 2 support were located in census blocks that were identified by FairPoint and approved by the Bureau in the challenge process in 2014; the remaining 1,027 locations actually were in 185 census blocks that had not been identified for that challenge process. Upon investigation, FairPoint determined the cause: a FairPoint employee who misunderstood the FCC's requirements had improperly associated the 1,027 locations¹³ in question with the census block number of the *serving nodes of the locations*, rather than with the census block numbers which contained the locations themselves.¹⁴

As a result, the challenge process was conducted for only 14 census blocks while the submitted locations were actually spread over 199 census blocks (the approved 14 census blocks plus 185 that were not approved prior to commencement of construction).¹⁵

In its internal investigation FairPoint also determined that *none* of the locations to which it deployed broadband in Virginia using CAF Phase I, Round 2 support were actually “served” within the meaning of the FCC's rule.¹⁶ Moreover, the 185 census blocks that were not properly vetted in advance through the challenge process include the locations initially identified for broadband deployment by FairPoint in 2013, based on FairPoint's good faith belief at that time that they were, in fact, “unserved” within the

¹³ FairPoint also is correcting the latitude and longitude coordinates for 27 of the 1,027 locations. *See* Attachment 2.

¹⁴ FairPoint's investigation also uncovered that the incorrect CLLI code was associated with some locations. *See* Attachment 1, Declaration of Michael Harrington.

¹⁵ Attachment 2 to this Petition contains a complete list of all locations that were submitted for funding, showing the original information as filed, the corrected information, and the impact, if any, on funding for each location.

¹⁶ 47 C.F.R. §§54.312(c)(2), (3).

meaning of the Commission's rules.¹⁷ For these reasons, FairPoint believes that its use of support in these census blocks did not adversely affect any competitor nor deviate in any way from service of the Commission's broadband goals.

II. GOOD CAUSE EXISTS FOR WAIVER OF THE COMMISSION'S RULES

The Commission may waive a rule for good cause shown.¹⁸ More specifically, the Commission may exercise its discretion to waive a rule where, due to special circumstances, deviation from the general rule would better serve the public interest than strict adherence to the general rule.¹⁹ The Commission may take into account consideration of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁰ As demonstrated herein, the relief requested by FairPoint is necessary both to prevent undue hardship to FairPoint and its customers, and will better serve the public interest than strict enforcement of the rule.

A. Enforcement of The Rule At This Time Would Result In Extreme Hardship To FairPoint and Its Subscribers

Enforcement of Section 54.312(c) as written should not be allowed to undermine broader Commission policies promoting universal voice and broadband service. FairPoint used its CAF Phase I, Round 2 support in Virginia to deploy broadband to the Unserved and Underserved locations in the manner intended by the Commission. FairPoint now offers broadband service to the required numbers of locations that either lacked access to broadband or lacked access to high-speed broadband, and as far as

¹⁷ See Attachment 1, Declaration of Michael Harrington (confirming how errors occurred in the identification of locations in Virginia).

¹⁸ 47 C.F.R. § 1.3.

¹⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

²⁰ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

FairPoint was able to determine both the revised census blocks and the locations met the eligibility criteria at the time of build-out. FairPoint's error, therefore, was a technical one: it failed to identify 185 out of 199 census blocks in a timely manner, which meant that those 185 census blocks were not included in the CAF Phase I, Round 2 challenge process conducted in 2013 and concluded in January 2014. This occurred through a good faith error on the part of a FairPoint employee, and not in any attempt to circumvent the Commission's rule.

In the absence of a waiver, it is possible that USAC would disqualify all of the 1,027 locations to which FairPoint deployed broadband in the previously unidentified 185 census blocks, and require refund of the support associated with that deployment. Such a result would leave FairPoint with a substantial deficit of approximately \$575,000 – an amount that otherwise would be dedicated to continued expansion of its advanced service capabilities. This would cause a substantial adverse impact on both retail and wholesale customers in FairPoint's service territory. To put it simply, without the requested waiver, FairPoint's may not have access to sufficient funds to support CAF Phase II investment that is expected by the Commission and planned by the company

B. Deviation From the Rule Would Better Serve the Public Interest Than Enforcement of the Rule²¹

One of the Commission's primary purposes in transforming legacy universal service high-cost support programs was to target finite support amounts to high-cost locations that have been unserved or underserved under legacy programs. Despite FairPoint's erroneous identification of census blocks in Virginia, FairPoint has

²¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

implemented CAF Phase I, Round 2 in Virginia precisely as intended by the Commission, which was FairPoint's intention from the outset

Strict enforcement of the rule in this case effectively would punish FairPoint – and its customers – for the timely and substantial investment FairPoint made in underserved areas of Virginia. In contrast, by granting a limited waiver, as described more specifically below, the Commission could preserve the broadband advancements intended in its CAF rules and still ensure that no support was used to deploy locations already served by another provider.

FairPoint proposes that the Bureau conduct a challenge process, *nunc pro tunc*, to confirm whether any of the locations in the 185 previously unidentified census blocks were “served” within the meaning of the FCC’s rules and orders at the time FairPoint accepted CAF Phase I, Round 2 support. FairPoint also requests that the Commission instruct USAC to suspend its audit until this process is completed. If any of the locations in the 185 census blocks *were* actually served at the relevant time, they can be disqualified, and FairPoint may be required to refund the support associated with those locations; for all those locations *not* disqualified, FairPoint respectfully requests that it be permitted to keep the support associated with the locations where it deployed broadband in those census blocks, provided USAC finds that FairPoint otherwise has satisfied the Commission’s rules with respect to those locations. In this way, the Commission’s goals and policies may be better fulfilled than if the Commission simply disqualified all 185 census blocks without further inquiry.

C. Expedited Action Is Merited

FairPoint respectfully requests that the Commission act on this waiver request on an expedited basis. As noted above, the final build-out deadline for CAF Phase I, Round 2 was January 10, 2017, and USAC already is engaged in auditing carriers' performance in this program. Moreover, FairPoint is facing impending deadlines for its CAF Phase II broadband deployment, and is making decisions on a daily basis as to how best to marshal its capital resources to meet its commitments for that program. Action by the Commission on this petition will play a significant part in those decisions.

III. CONCLUSION

For the foregoing reasons, a waiver of Section 54.312(c) is appropriate to prevent undue hardship and to better serve the Commission's policies. Strict enforcement of the rule would work undue hardship on FairPoint and its wholesale and retail customers. Granting a limited waiver, and conducting a challenge process *nunc pro tunc*, as requested, would better serve the Commission's Connect America universal voice and broadband goals.

FairPoint Communications, Inc.

FairPoint respectfully requests that the Commission act on this waiver request on an expedited basis in light of the recent conclusion of the CAF Phase I, Round 2 program, impending deadlines for construction of CAF Phase II broadband, and ongoing USAC audits.

Respectfully submitted,



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